

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

9 GARRICK HARRINGTON, ) 1:05-cv-00624-OWW-GSA PC  
10 Plaintiff, ) ORDER GRANTING PLAINTIFF'S  
11 v. ) MOTIONS FOR THE ATTENDANCE  
12 A. K. SCRIBNER, et al., ) OF TWO INCARCERATED  
13 Defendants. ) WITNESSES  
 ) (Docs. 65 and 66)

This action, brought pursuant to 42 U.S.C. § 1983, proceeds on Plaintiff's amended complaint, filed April 28, 2006, against Defendants Hicks, Fuhlrodt, Woods, and Lowden for violation of the Eighth Amendment, and against Defendants Yamamoto, Poulos, and Scribner for violation of the Equal Protection Clause of the Fourteenth Amendment. This matter is set for jury trial on July 28, 2009, at 9:00 a.m. before the Honorable Oliver W. Wanger. On May 11, 2009, Plaintiff filed motions seeking the attendance of incarcerated witnesses Andrew Piazza and Blaine Applin. Defendants filed an opposition on June 4, 2009.

Plaintiff seeks the attendance of Andrew Piazza, who witnessed Plaintiff's slip and fall on May 5, 2004, and Blaine Applin, who witnessed the fall of inmate Oliver on April 30,

1 2004, and has knowledge of the conditions under which Plaintiff  
2 fell. (Doc. 65, Harrington Dec., ¶3; Doc. 66, Harrington Dec.,  
3 ¶¶3-5.) Plaintiff states that neither witness is willing to  
4 voluntarily testify. (Doc. 65, 2:4-5; Doc. 66, 2:2-3.)

5 Defendants oppose the motions on the grounds that the  
6 witnesses are not willing to testify voluntarily; Piazza's  
7 proposed testimony is unnecessary, irrelevant, and cumulative;  
8 and Applin's proposed testimony is speculative and irrelevant.<sup>1</sup>

9 The uncertainty regarding whether or not the proposed  
10 witnesses are willing to testify voluntarily does not preclude  
11 the Court from ordering their transportation. Rather, in  
12 determining whether to grant Plaintiff's motions for the  
13 attendance of his proposed witnesses, factors to be taken into  
14 consideration include (1) whether the inmate's presence will  
15 substantially further the resolution of the case, (2) the  
16 security risks presented by the inmate's presence, (3) the  
17 expense of transportation and security, and (4) whether the suit  
18 can be stayed until the inmate is released without prejudice to  
19 the cause asserted. Wiggins v. County of Alameda, 717 F.2d 466,  
20 468 n.1 (9th Cir. 1983); see also Walker v. Sumner, 14 F.3d 1415,  
21 1422 (9th Cir. 1994) (district court did not abuse its discretion  
22 when it concluded the inconvenience and expense of transporting  
23 inmate witness outweighed any benefit he could provide where the  
24 importance of the witness's testimony could not be determined),  
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27 <sup>1</sup> Defendants also argue that the motions are untimely. In light of the  
28 prison mailbox rule, the motions appear to be timely, and Defendants' argument  
to the contrary is rejected. Douglas v. Noelle, No. 06-35195, 2009 WL  
1564235, \*4-6 (9th Cir. Jun. 5, 2009).

1 *abrogated on other grounds by Sandin v. Conner, 515 U.S. 472, 115*  
2 *S.Ct. 2293 (1995)*.

3 Plaintiff attests that Piazza has firsthand knowledge of the  
4 events on May 5, 2004, when Plaintiff fell. While Plaintiff does  
5 not state where Piazza was located, firsthand knowledge indicates  
6 that Piazza saw the fall happen, making his testimony relevant.  
7 Plaintiff attests that Applin has firsthand knowledge of the  
8 conditions on April 30, 2004, when inmate Oliver allegedly fell,  
9 and on May 5, 2004, when Plaintiff fell. Given that the  
10 allegedly hazardous condition of the wet floor is at issue and  
11 caused two inmates to fall, Applin's proposed testimony is  
12 relevant.

13 The Court has no information before it that either Piazza or  
14 Applin pose any exceptional security risk, or that transport and  
15 security are unduly burdensome. Piazza is located at a prison  
16 several hours away, and Applin is located at a prison  
17 approximately one hour away, so extensive travel is not an issue.  
18 Finally, Defendants stated in their pretrial statement that  
19 Plaintiff is serving a life sentence, and the Court has no  
20 information before it regarding the sentences of Piazza or  
21 Applin. Therefore, delaying the trial is not an option.

22 Based on the proposed testimony of the witnesses, both of  
23 whom allegedly witnessed events or conditions relevant to  
24 Plaintiff's claims, Plaintiff's motions for the attendance of  
25 incarcerated witnesses, filed May 11, 2009, are HEREBY GRANTED,  
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1 and orders directing the transportation of Plaintiff and his two  
2 inmate witnesses will be issued closer to the trial date.

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4 IT IS SO ORDERED.  
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6 Dated: June 12, 2009 /s/ Gary S. Austin  
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